

Appendix 1

Memorandum Opinion

Ninth Circuit
May 29, 2018

FILED

NOT FOR PUBLICATION

MAY 29 2018

UNITED STATES COURT OF APPEALS

**MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

JUSTIN LYLE IZATT,

No. 17-35130

Petitioner - Appellant

**D.C. Nos.
CV 13-00431-S-EJL
CR 10-00112-S-EJL**

v.

UNITED STATES OF AMERICA

MEMORANDUM*

Respondent - Appellee

**Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, United States District Judge, Presiding**

**Argued and Submitted May 9, 2018
Seattle, Washington**

Before: GOULD and IKUTA, Circuit Judges, and TUNHEIM, Chief District Judge.**

Petitioner - Appellant Justin Izatt appeals the District Court's denial of his 28 U.S.C. § 2255 petition without an evidentiary hearing. Izatt argues that his trial counsel provided ineffective assistance by (1) waiving Izatt's speedy trial rights

*** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.**

**** The Honorable John R. Tunheim, Chief United States District Judge for the District of Minnesota, sitting by designation.**

without his consent; (2) failing to investigate, communicate with Izatt, and prepare for trial; (3) making and breaking a promise to the jury that Izatt would testify; (4) failing to request a continuance before calling defense witness Mariah Pace; (5) failing to fully develop defense testimony; and (6) committing various errors at the sentencing phase. For the reasons that follow, we affirm the denial of Izatt's habeas petition without an evidentiary hearing.

We review the denial of a § 2255 petition de novo, *United States v. Reves*, 774 F.3d 562, 564 (9th Cir. 2014), and the denial of an evidentiary hearing on the petition for an abuse of discretion, *United States v. Rodrigues*, 347 F.3d 818, 823 (9th Cir. 2003). An evidentiary hearing is warranted if the petitioner makes "specific factual allegations that, if true, state a claim on which relief could be granted." *United States v. Withers*, 638 F.3d 1055, 1062 (9th Cir. 2011) (quoting *United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir. 1984)). A claim of ineffective assistance of counsel requires a petitioner to show both that counsel's performance was deficient and that the deficient performance prejudiced the petitioner. *Vega v. Ryan*, 757 F.3d 960, 965 (9th Cir. 2014) (per curiam) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)).

I.

With regard to counsel's request for a continuance, Izatt fails to allege prejudice. If Izatt's counsel had not agreed to continuances, Izatt would have proceeded to trial on time, and there would have been no basis for a motion to dismiss the charges. As such, Izatt has not alleged facts that show that, "but for counsel's unprofessional errors, the result of the proceeding would have been different."

Strickland, 466 U.S. at 694.

II.

With regard to counsel's failure to investigate, communicate with Izatt, and prepare for trial, Izatt has not alleged specific facts that show deficient performance or prejudice. He alleges no specific errors that stemmed from counsel's failure to spend time with him or failure to communicate with him. Counsel's decisions regarding investigation and interviewing of witnesses were trial strategy decisions, and "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690. Moreover, the additional witnesses' testimony would have been cumulative; thus, Izatt has not shown that he was prejudiced. *See Wong v. Belmontes*, 558 U.S. 15, 22-23 (2009); *Bible v. Ryan*, 571 F.3d 860, 871 (9th Cir. 2009).

III.

With regard to counsel's broken promise to the jury that Izatt would testify, Izatt has not alleged facts that show deficient performance or prejudice. Counsel reasonably changed strategies after Pace testified that the methamphetamine was hers, and Izatt has not alleged facts that show that the result of his proceeding would have been different had he testified. Indeed, it is likely that Izatt's testimony would have been more prejudicial than his failure to take the stand.

IV.

With regard to counsel's failure to request a continuance before calling Pace, Izatt has not alleged facts that show prejudice. He alleges no facts that counsel could have discovered during the continuance that would have rehabilitated Pace. Thus, there is no reason to think that the result of the proceeding would have been different had a continuance been sought.

V.

With regard to counsel's failure to develop Pace's testimony, Izatt has not alleged facts that show deficient performance because Attorney Nelson was not responsible for examining Pace. With regard to counsel's failure to develop Brandon Harvey's testimony, Izatt has not alleged facts that show prejudice because the referenced testimony was elicited by the United States and did not help Izatt's case.

VI.

With regard to counsel's performance at the sentencing phase, Izatt has not alleged prejudice. Izatt faced a mandatory minimum sentence of life imprisonment; thus, even improved performance by counsel would not have changed the outcome at sentencing.

Because Izatt failed to make specific factual allegations that, if true, would constitute ineffective assistance of counsel, the District Court did not err in denying his § 2255 petition and did not abuse its discretion in denying an evidentiary hearing.

AFFIRMED.

Appendix 2

Order

District Court
Feb. 1, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JUSTIN LYLE IZATT,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

Case No. 1:13-CV-00431-EJL
1:10-CR-00112-EJL

**MEMORANDUM DECISION
AND ORDER**

Pending before the Court in the above entitled matter is Petitioner Justin Lyle Izatt's Motion to Vacate or Set Aside Sentence under 28 U.S.C. § 2255 (CIV Dkt. 1, CR Dkt. 114). This matter is fully briefed by the parties.

Having fully reviewed the record, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, this matter shall be decided on the record before this Court without oral argument.

MEMORANDUM DECISION AND ORDER - 1

FACTUAL BACKGROUND

Mr. Izatt was originally indicted on one count of possession with intent to distribute 50 grams or more of a mixture and substance containing methamphetamine. The charge was amended to possession with intent to distribute 50 grams of actual methamphetamine. Defendant retained two attorneys to represent him at trial. The jury found Mr. Izatt guilty on the amended charges (CR Dkt. 63). Because this conviction was Mr. Izatt's third felony conviction for controlled substances, the Court had no discretion at sentencing and Mr. Izatt was sentenced to life imprisonment, a 10 year term of supervised release, and a \$100 special assessment.

Prior to sentencing, Mr. Izatt filed a motion for acquittal which was denied by the Court. CR Dkt. 70. Mr. Izatt filed a direct appeal challenging his life sentence and certain rulings made during the course of the trial. The Ninth Circuit affirmed the District Court. CR Dkts. 93 and 95. The United States Supreme Court denied his Petition for Writ of Certiorari. CR Dkt. 97. Mr. Izatt next filed a motion for a new trial. CR Dkt. 98. This motion was denied. CR Dkt. 103. This ruling was also appealed to the Ninth Circuit. The Ninth Circuit affirmed the District Court's denial of the motion for a new trial. CR Dkts. 118 and 119.

Now, Mr. Izatt has filed his § 2255 motion alleging ineffective assistance of counsel during the pre-trial phase of his criminal case, during the jury phase, and during the sentencing phase. Mr. Izatt has provided declarations in support of his motion. The

Government has responded to the motion and included an affidavit of Mr. Douglas Nelson, one of Mr. Izatt's trial attorneys.

STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 2255, the Court recognizes that a response from the government and a hearing are required “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief....” Furthermore, a hearing must be granted *unless* the movant's allegations, “when viewed against the record, either fail to state a claim for relief or are ‘so palpably incredible or patently frivolous as to warrant summary dismissal.’” *United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir.); *Marrow v. United States*, 772 F.2d 525, 526 (9th Cir. 1985). However, a district court may summarily dismiss a Section 2255 motion “[i]f it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief....” Rule 4(b), Rules Governing Section 2255 Proceedings in the United States District Court. Thus in order to withstand summary dismissal of his motion for relief under Section 2255, defendant “must make specific factual allegations which, if true, would entitle him to relief on his claim.” *United States v. Keller*, 902 F.2d 1391, 1395 (9th Cir. 1990). In the present case, the legal issues presented do not require an evidentiary hearing.

INEFFECTIVE ASSISTANCE OF COUNSEL

1. Standard of Review for Ineffective Assistance of Counsel Claim

The Sixth Amendment guarantees "the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). To establish a constitutional violation based on ineffective assistance of counsel, a petitioner must show both (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 692, 694 (1984).

Establishing "deficient performance" requires the movant to show that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 687; *Harrington v. Richter*, 562 U.S. 86, 104 (2011). "Deficient performance" means representation that "fell below an objective standard of reasonableness." *Stanley v. Cullen*, 633 F.3d 852, 862 (9th Cir. 2011). In evaluating counsel's performance, the court must apply a strong presumption that counsel's representation fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689 (A "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.").

Prejudice means that the error actually had an adverse effect on the defense. To demonstrate prejudice, the movant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Harrington*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 693). A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the movant as a result of the alleged deficiencies. *Strickland*, 466 U.S. at 697. Nor does the court need to address both prongs of the *Strickland* test if the petitioner's showing is insufficient as to one prong. *Id.* at 697.

2. Pre-Trial Claim

Petitioner claims attorney, Mr. Nelson, spent very little time with him prior to trial and his failure to spend more time with Mr. Izatt resulted inadequate preparation for trial. Petitioner claims counsel failed to spend sufficient time conferring with Mr. Izatt, discussing trial strategies, and discussing potential witnesses and evidence for the defense. Petitioner claims counsel failed to investigate potential witnesses for the defense as requested by Petitioner.

It is important to note that Mr. Izatt had *two* attorneys representing him. One attorney lived in the Boise area where Mr. Izatt was being detained. The other attorney lived in Hailey, Idaho, several hours from where Mr. Izatt was being detained. The § 2255 motion appears to be focused on alleging Mr. Nelson was ineffective, not Mr. Gatewood. Mr. Nelson indicates in his affidavit that Mr. Gatewood was responsible for meeting with Mr. Izatt more regularly than he met with him. This explanation is not disputed by Mr. Izatt.

As to not spending enough time with Mr. Izatt, Mr. Nelson is clear in his affidavit he does not spend a lot of time with any client and this case was not complex even though Mr. Izatt was facing a life sentence if convicted. Mr. Nelson indicates he did talk with certain witnesses, but determined those witnesses would not be helpful to the trial strategy. The strategy was to show the informant, Mr. Harvey, had access to the garage where the drugs were stored and they were his drugs, not Mr. Izatt's. Mr. Harvey was offered immunity in exchange for his testimony. Mr. Nelson's strategy was to argue the jury should place little weight on Mr. Harvey's testimony based on his deal for immunity. Mr. Nelson indicates in his affidavit he personally interviewed Mr. Harvey two times before trial. Mr. Nelson indicates this was unusual for him to be able to interview a confidential informant for the Government before trial.

Mr. Nelson also sets forth in his affidavit why he elected not to call other witnesses at trial. Since Mr. Izatt did not have a regular source of income, but had many valuable assets Mr. Nelson thought the jury might determine the assets were beyond his means and must be from drug activities – regardless of how his friends and family testified.

Failure to interview other witnesses was a strategic call and it does not establish ineffective assistance of counsel especially in light of the other trial testimony in this matter. “Even the best criminal attorneys would not defend a particular client the same way.” *Strickland* at 689 citing *Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L.Rev. 299, 343 (1983). Simply put, Mr. Nelson’s failure to interview certain witnesses (when advised what they would testify to) did not affect the outcome of this case and do not demonstrate ineffective assistance of counsel in preparing for trial.

As to counsel’s emergency motion to continue the trial without Mr. Izatt’s consent, the Court found the medical issues submitted by counsel justified a continuance. Mr. Izatt’s constitutional rights were not violated as the Speedy Trial Act provides for continuances for good cause shown, regardless of whether or not the defendant agrees with the continuance. Mr. Izatt would have been prejudiced if a new lawyer had to step in on short notice. Instead he benefitted from continuity of counsel. There is no showing that the short continuance impacted the outcome in this case, so it cannot be considered a basis for ineffective assistance of counsel.

The claim for ineffective pretrial assistance of counsel is denied.

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3. Trial Claim

Petitioner sets forth a string of examples alleging Mr. Nelson was ineffective at trial. Mr. Nelson is an experienced criminal defense attorney and he responded in his affidavit why he took certain actions. In examining these claims, it is important to note that Mr. Izatt does not contest that he told Mr. Nelson prior to the trial that he did not want to place the blame for the drugs on either of his friends who had access to his house: Mariah Pace or Holly Sutherland. Based on this desire, the strategy for trial was to discredit Mr. Harvey's testimony as being motivated by his immunity deal and to have Mr. Izatt testify the drugs were not his but were planted by Mr. Harvey.

At some point, the defense team decided to call Ms. Pace as a witness in its case-in-chief. Ms. Pace had not been called in the Government's case-in-chief. It is unclear from the record when this decision was made. Ms. Pace's testimony was not mentioned by Mr. Nelson in his opening when he implied Justin would likely testify to discuss his relationship and transactions with Harvey. However, often who actually testifies changes as the trial progresses. Based on the admission of Mr. Izatt's prior drug convictions by the Court under Rule 404, that may have also impacted whether Mr. Izatt would take the stand.

Mr. Gatewood (not Mr. Nelson) handled the examination when Ms. Pace testified that the drugs were hers, not Mr. Izatt's and she was living at Mr. Izatt's house at the time. At that point, it no longer made sense for Mr. Izatt to testify that the drugs were planted by Mr. Harvey as implied in the defense opening. What the defense did not expect was that the Government would offer an immunity deal to Ms. Pace to testify truthfully about the source of the drugs over the evening break before she testified before the jury but after Fifth Amendment issues had been addressed by the Court outside the presence of the jury. The Court had allowed Ms. Pace to be examined by defense and government counsel outside the presence of the jury to allow her to raise a Fifth Amendment privilege to certain questions the evening before she testified and before the jury.

So after Ms. Pace testified for the defense, the government cross-examined Ms. Pace to allow the jury to see if her testimony about getting the drugs from another friend who was in jail made sense and if she was credible. A model instruction about her benefits from the Government affecting her credibility was given to the jury just as it was for Mr. Harvey who also received benefits from the government for testifying. Jury Instructions 25 and 26, Dkt. 60. The Court finds the admission of ownership by Ms. Pace may have impacted the trial strategy of having Mr. Izatt testify, but nothing actually prevented Mr. Izatt from electing to testify on his behalf after Ms. Pace said the drugs were hers.

Mr. Nelson indicates that it may have been error on his part not to have requested a continuance in the trial after Ms. Pace was cross-examined and it was discovered she had been granted immunity. However, a continuance would not have changed Ms. Pace's testimony and co-counsel effectively examined Ms. Pace about her ownership of the drugs. Therefore, even if it was ineffective assistance for counsel not to have requested a continuance, no prejudice has been shown from failing to request a brief continuance. The Court would not have granted more than a brief continuance even if requested at that stage in the litigation. Ms. Pace's credibility on the stand was definitely at issue when she disclosed her immunity agreement and also admitted to methamphetamine use prior to testifying. The Court finds it is a reasonable assumption based on the jury verdict rendered that the jury did not find Ms. Pace's testimony credible since they convicted Mr. Izatt.

Defense counsel also called other witnesses at trial on Defendant's behalf: a former girlfriend, Holly Sutherland, who testified she regularly gave cash to Mr. Izatt and where he had previously worked and Mr. Harvey who testified Crown Royal bags were regularly used to protect meth pipes but he had never seen Justin use a Crown Royal bag for that purpose. While the defense of Ms. Pace owning the drugs and Mr. Izatt not being involved was not believed by the jury, this does not mean counsel was ineffective at presenting a defense. Advocacy is an art and not a science, trials are fluid and unexpected things such as immunity being granted to a witness occur. But strategic choices by counsel must be respected in these circumstances if they are based on professional

judgment. The Court finds the decision not to call Mr. Izatt as a witness was a strategic decision based on the other evidence admitted and testimony given by Mr. Harvey and Ms. Pace.

Mr. Izatt also points to the affidavit of Ms. Pace that states Mr. Nelson was representing her on state court criminal charges at the same time he was representing Mr. Izatt. Ms. Pace has not shown that a conflict of interest existed since the nature of state court charges are not described and she offered to testify in Mr. Izatt's trial. Moreover, the Court appointed independent CJA counsel for Ms. Pace before she testified at Mr. Izatt's trial.

Ms. Pace alleges that Mr. Nelson did not adequately prepare her for her testimony. Assuming this fact is true, it does not rise to the level of ineffective assistance of counsel as she was not examined by Mr. Nelson and it was Mr. Gatewood's duty to handle her examination during trial. Ms. Pace does not say in her affidavit that she tried to provide additional information about the case to Mr. Gatewood and it was ignored. Counsel cannot be expected to read the mind of a witness about what information they want to provide. Moreover, Nelson indicates over 10 hours were spent preparing Ms. Pace to testify and at no time prior to trial did Ms. Pace allege she was the owner of the drugs.

Ms. Pace alleges in her affidavit that she lived in Justin's house and he was in Boise at the time of the events. But these facts were communicated to the jury via her testimony when Ms. Pace explained her relationship with Mr. Izatt (former girlfriend living at his house with his permission), the fact Mr. Izatt had been in Boise visiting his

girlfriend and the fact she purchased the drugs from Chris Ayers. *See Trial Transcript, Dkt. 85, p. 9-38* (Transcript pages 288- 317). Ms. Pace indicated to the jury that Mr. Nelson had previously represented her and that she was not happy about the outcome of her charges which stemmed from a stolen property investigation and resulted in drug charges based on trace amounts. The testimony established potential bias for her testimony as it related to her friend Mr. Izatt, but does not establish ineffective assistance of counsel.

The Court acknowledges that Ms. Pace was not a credible witness before the jury. She was nervous when testifying and she clearly wanted to tell the jury more than what counsel for the defense or government were asking. She acknowledged her use of drugs over a period of years and it is not unreasonable for the jury to have found the drug usage may have affected her cognitive ability to recall events. Her credibility was also affected by her agreement with the government for immunity.

Mr. Izatt also argues that based on the affidavit of Mr. Harvey, Harvey's testimony was misconstrued by the jury. Mr. Harvey claims when he was asked about buying drugs from Mr. Izatt he said yes. But he did not clarify to the jury "when" the purchases took place and that this sometimes involved purchasing drugs from Ms. Pace after being referred to do so by Mr. Izatt. The Government recalled Mr. Harvey to testify after Ms. Pace testified in Defendant's case-in-chief. *See Trial Transcript, Dkt. 85, p. 39-41* (Transcript page numbers 318-320). Mr. Harvey testified that he purchased drugs from Ms. Pace in early 2009, late 2008. He stated he purchased the methamphetamine from

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Ms. Pace at Justin's house. Mr. Harvey testified as to the purchase process: he would call Justin Izatt, Mr. Izatt would say he was out of town and to call Ms. Pace. Mr. Harvey would call Ms. Pace and pick up the drugs at Mr. Izatt's house from Ms. Pace. Mr. Harvey would pay Mr. Izatt for the drugs. So when Mr. Harvey was recalled to the stand by the Government, this testimony clarified the time period Mr. Harvey made purchases from Mr. Izatt. The Court is not convinced after reading the transcripts that the jury was misled by Mr. Harvey's testimony. Additionally, it is undisputed that Mr. Harvey was subject to extensive cross examination when he testified in the Government's case-in-chief.

While Mr. Harvey may have also purchased drugs directly from Ms. Pace without Mr. Izatt's involvement as he states in his affidavit, that testimony is not relevant and would not have changed the outcome in this case since it is clear Mr. Harvey testified as to the time period in question that his process of purchasing drugs began by calling Mr. Izatt who directed him to call Ms. Pace, pick up drugs from Mr. Izatt's house and pay Mr. Izatt. A jury could conclude from the testimony that Mr. Izatt was involved in the process of distributing drugs late 2008, early 2009. While Mr. Harvey may have also purchased

other drugs directly from Ms. Pace up until the date he went to jail in October of 2009, those other purchases are not at issue in this case.

Mr. Harvey's affidavit also addresses his opinion that many people in the drug business use Crown Royal bags. The Court does not contest this opinion. The fact that Mr. Harvey did not see Mr. Izatt use a Crown Royal bag is not probative or persuasive. The Government provided evidence that Mr. Izatt had possession of Crown Royal bags for drugs and paraphernalia in previous drug arrests. The drugs in the garage ceiling were stored in a Crown Royal bag. It was up to the jury to consider all the evidence presented and determine whether Mr. Izatt should be convicted. The Court finds Mr. Harvey's proffered testimony in his affidavit that he saw Ms. Pace use a Crown Royal bag for glass pipes and other drug paraphernalia is again insufficient to support a claim for ineffective assistance of counsel.

Mr. Harvey says in his affidavit he does not know who placed the drugs in the ceiling in the garage and that he did not tell Mr. Izatt or Ms. Pace that he had discovered the drugs in the ceiling. This is what he testified to at trial. He found drugs in the ceiling when he was installing a garage door opener at Mr. Izatt's house. This is not new evidence and was subject to direct and cross examination at trial so it cannot support a claim of ineffective assistance of counsel post trial. The Court finds the jury was not misled on the facts and even if testimony in Mr. Harvey's affidavit had been included at

trial it would not have changed the outcome in this proceeding in light of all the evidence presented.

Without discussing in detail each specific allegation of ineffective assistance of counsel during the trial, the Court has addressed the main trial allegations and has considered all the alleged instances of ineffective assistance of counsel during the trial. Based on the record in this matter, the Court finds the trial actions, alleged omissions, and decisions, individually or collectively, do not rise to the level of ineffective assistance of counsel as they do not establish the result would have been different if certain witnesses had been called, witnesses had offered additional testimony or a continuance was requested.

4. Sentencing Claim

Petitioner claims his counsel was ineffective at sentencing for failing to file any objections to the Presentence Investigation Report, failing to review the report with him prior to the sentencing hearing and failing to request a continuance of the sentencing hearing. Specifically, Mr. Izatt argues that his counsel should have contested his criminal history by arguing because two state convictions were sentenced together, they should have been deemed one conviction instead of two for purposes of determining whether he had two prior convictions for drug trafficking. Additionally, counsel should have argued mitigating factors.

The Court finds these arguments are insufficient to establish ineffective assistance of counsel. Mr. Izatt knew going into the trial that based on his prior drug related convictions, he was facing a mandatory sentence of life imprisonment if convicted as the Government filed a notice it intended to seek the sentencing enhancement prior to the commencement of the trial. CR Dkt. 25. The failure on the part of counsel to file any objections would not have changed the outcome at sentencing. Even if the objections were filed and mitigating arguments made, the Court was without authority to sentence below the statutory mandatory sentence.

While Mr. Izatt wants to argue his two state sentences should not count as two convictions, the Court respectfully disagrees. While Mr. Izatt was sentenced for two different criminal cases on the same day and the sentences ran concurrent to each other for the same length of imprisonment, the Court cannot ignore that Mr. Izatt had two separate convictions. He did not negotiate to have one case dismissed in exchange for pleading guilty to the other case. Instead, each case represented different criminal conduct by Mr. Izatt and each case, regardless of how he was sentenced, resulted in a drug trafficking conviction. Under the Guidelines and the law, the Court had no discretion in counting both drug convictions. Upon the jury returning a guilty verdict in the federal case, the Court was required by law to impose a sentence of life imprisonment without release pursuant to 21 U.S.C. § 841(b)(1)(A).

On this claim, Mr. Izatt cannot carry his burden to show any prejudice from the alleged ineffective assistance of counsel allegations and the claim must be denied.

5. Conclusion

This is a difficult case not because of the facts and the representation of counsel, but because of the mandatory sentence this Court was required to impose. “An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland* at 691-92 citing *United States v. Morrison*, 449 U.S. 361, 364–365 (1981). Here, the Court finds even if counsel’s representation was below the professional standard (which the Court finds it was not), the prejudice prong has not been satisfied and the jury verdict would not have been effected by the alleged instances of ineffective assistance of counsel, individually or collectively, from trial preparation to the trial to the sentencing hearing.

This is not a case of bad lawyering. It is a case of a guilty jury verdict based on all the evidence submitted and the lack of credibility of certain witnesses. The motion for a writ of habeas corpus based on ineffective assistance of counsel must be denied.

CERTIFICATE OF APPEALABILITY

A certificate of appealability should be issued pursuant to 28 U.S.C. § 2253 only if the petitioner makes a substantial showing that he has been denied a constitutional right. 28 U.S.C. § 2253(c)(2). To make such a showing, Petitioner must demonstrate that the issues are debatable among jurists of reason, that a court could resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed further. *Lozada v. Deeds*, 498 U.S. 430, 431-32 (1991) (per curiam); *Barefoot v. Estelle*, 463 U.S. 880, 892-93 (1983); *Williams v. Calderon*, 83 F.3d 281, 286 (9th Cir. 1996) (The standard for obtaining a certificate of appealability under the AEDPA is more demanding than the standard for obtaining a certificate of probable cause pre-AEDPA); *Clark v. Lewis*, 1 F.3d 814, 819 (9th Cir. 1993).

Here, the Court finds a certificate of appealability should be issued based on the life sentence imposed due to the conviction. While this Court does not find the alleged ineffective assistance of counsel claims, individually or collectively, to support a finding a writ of habeas should be granted, the Court also finds the issues are adequate to deserve a review by the Ninth Circuit. For this reason a certificate of appealability is granted.

ORDER

IT IS ORDERED:

1. Petitioner's Motion to Vacate or Set Aside Sentence (CIV Dkt. 1, CR Dkt. 114)

is **DENIED**.

2. The Court **GRANTS** a certificate of appealability on the denial of this § 2255 motion.



DATED: February 1, 2017



Honorable Edward J. Lodge
U. S. District Judge

Appendix 3

Judgment

District Court
Feb. 1, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JUSTIN LYLE IZATT,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

Case No. 1:13-CV-00431-EJL
1:10-CR-00112-EJL

JUDGMENT

Based upon this Court's Memorandum Decision and Order, entered herewith, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Petitioner, Justin Lyle Izatt, take nothing the Respondent and the civil action associated with this matter is **DISMISSED IN ITS ENTIRETY**.



DATED: February 1, 2017


Honorable Edward J. Lodge
U. S. District Judge

Appendix 4

28 U.S.C. §2255 Motion

District Court
Oct. 1, 2013

**PAUL E. RIGGINS, I.S.B. #5303
RIGGINS LAW, P.A.
P.O. BOX 5308
BOISE, IDAHO 83705
TELEPHONE (208) 344-4152
FACSIMILE (208) 344-0588
Email: rigginslaw1@yahoo.com**

ATTORNEY FOR PETITIONER/DEFENDANT IZATT

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

UNITED STATES OF AMERICA,)	CASE NO. CR-10-0112-S-EJL
Plaintiff,)	
))	
vs.)	MOTION TO VACATE OR
JUSTIN LYLE IZATT,)	SET ASIDE SENTENCE
Defendant.)	UNDER 28 U.S.C. §2255
)	
)	

Petitioner JUSTIN LYLE IZATT, by and through his attorney of record, Paul E. Riggins, and pursuant to 28 U.S.C. §2255, hereby moves this Court for its Order vacating or setting aside the Petitioner's sentence, in that the judgment against the Petitioner violates the Constitution or laws of the United States, as set forth below.

LEGAL AUTHORITY

Section 2255 of Title 28 provides the legal authority for the Petitioner's motion. It states that "[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the

**MOTION TO VACATE OR SET ASIDE
SENTENCE UNDER 28 U.S.C. §2255**

sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, ... or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence." Izatt's Motion is properly raised under this section of United States law.

INEFFECTIVE ASSISTANCE OF COUNSEL

Izatt's Motion is based on a violation of his Sixth Amendment right to counsel under the United States Constitution, based upon claims on ineffective assistance of counsel. The landmark case on ineffective assistance of counsel claims is *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *Strickland*, the United States Supreme Court first defined the right to counsel contained within the Sixth Amendment as the right to the effective assistance of counsel. *Id.*, 466 U.S. at 686 (citing *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970)). Counsel can deprive a defendant of the right to effective assistance of counsel simply by failing to render "adequate legal assistance." *Id.* (citing *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)). The purpose of the right is, simply, to ensure a fair trial. *Id.* "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*

The *Strickland* case established a two-prong test for analyzing ineffective assistance of counsel claims. To prevail on a claim for ineffective assistance of counsel, the Petitioner must demonstrate (1) that trial counsel's performance was

“deficient”, and (2) that the Petitioner was prejudiced by counsel’s performance. *Strickland*, 466 U.S. at 687.

To establish that trial counsel’s performance was deficient, the Petitioner must show that the attorney’s representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. The proper measure of attorney performance is “reasonableness under prevailing professional norms.” *Id.*, 466 U.S. at 688. The Petitioner must overcome a presumption that the attorney’s conduct falls within a wide range of reasonable professional assistance and sound trial strategy. *Id.*, 466 U.S. at 689.

Proving “prejudice” requires a showing that “there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” *Strickland* , 466 U.S. at 694; *Moore v. Czerniak*, 574 F.3d 1092, 1100 (9th Cir. 2009). A “reasonable probability” is defined as “a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Moore*, 574 F.3d at 1100, 1109.

The *Strickland* decision outlines specific duties that trial counsel must honor in representing criminal defendants. Counsel must assist the defendant and owes the defendant a duty of loyalty. *Strickland*, 466 U.S. at 688. Counsel’s “overarching duty” to advocate the defendant’s cause includes the duty to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course” of the case. *Id.* Counsel has a duty to make “reasonable investigations” regarding the case. *Id.*, 466 U.S. at 691. Counsel has a duty to “bring to bear such skill and knowledge as will render the trial

a reliable adversarial testing process." *Id.*, 466 U.S. at 688.

The United States Supreme Court has declared that the "ultimate focus of the inquiry must be on the fundamental fairness" of the proceedings throughout the case. *Id.*, 466 U.S. at 696. They further declared that

"In every case, the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.*

Petitioner asserts that his trial counsel failed to fulfill his duties as defense counsel, failed to follow the dictates of the United States Supreme Court in *Strickland*, and failed to provide competent assistance of counsel during the pre-trial, jury trial, and sentencing phases of his case, as set forth in detail below.

MOTION

1. Petitioner challenges the Judgment of Conviction entered in the District Court for the District of Idaho, based in Boise, Idaho. The criminal docket and case number is CR-10-0112-S-EJL.
2. The date of the Judgment of Conviction was March 29, 2011. Petitioner was sentenced on March 28, 2011. The presiding judge was Edward J. Lodge.
3. Petitioner was sentenced to life in prison, without the possibility of release.
4. The nature of the crime was Possession of Methamphetamine With Intent To Distribute, 21 U.S.C. §841(a)(1) and §841(b)(1)(B).
5. Petitioner pled not guilty to the charge against him.
6. Petitioner proceeded to a Jury Trial, which was conducted on December 14 – 16, 2010.

7. Petitioner did not testify at the Jury Trial. Petitioner did not formally testify at any hearing in the case. He addressed the Court at his Sentencing Hearing.
8. Petitioner appealed from the Judgment of Conviction.
9. The details of Petitioner's appeal are as follows:
 - a. Name of Court: United States Court of Appeals for the Ninth Circuit
 - b. Docket and Case Number: No. 11-30089
 - c. Result: Petitioner's appeal was denied
 - d. Date of result: May 10, 2012.
 - e. Case citation: *United States v. Izatt*, 480 Fed. Appx. 447, 450 (9th Cir. 2012)
 - f. Grounds raised: (1) denial of Motion To Suppress, (2) excessive and unconstitutional sentence, and (3) allowing improper F.R.E. Rule 404(b) evidence at jury trial.
 - g. Petitioner filed a Petition for Writ of Certiorari in the United States Supreme Court.
 - i. Docket and Case Number: No. 12-5294
 - ii. Result: Certiorari was denied.
 - iii. Date of result: October 1, 2012
 - iv. Case citation: *Justin Lyle Izatt v. United States*
 - v. Grounds raised: (1) denial of Motion To Suppress, (2) excessive and unconstitutional sentence
10. Other than the direct appeals noted above and in Section 14 below, Petitioner has not previously filed any other motions, petitions or applications

concerning this Judgment of Conviction in any Court.

11. Petitioner has additional information regarding other motions or petitions, as noted above in Section 10 above, and as set forth in Section 14 below.

12. Petitioner states the following grounds in support of his Petition To Vacate or Set Aside his sentence herein:

Ground One: Petitioner was denied his 5th, 6th and 14th Amendment rights to effective assistance of counsel during the pre-trial phase of his criminal case.

a. Supporting facts:

1. Petitioner's trial court attorney, Mr. Nelson, failed to spend sufficient time with the Petitioner to adequately prepare the Petitioner's defense for trial and to adequately confer with the Petitioner about trial strategies, potential evidence and witnesses, and legal matters and defenses. Petitioner was incarcerated during the entire pendency of this case. Petitioner recalls that, prior to trial, Mr. Nelson visited him one time in the Canyon County Jail, for approximately two hours, and visited him two times in the Ada County Jail, for an hour or less each time. Petitioner recalls that he spoke with Mr. Nelson on the phone for a few minutes as well. To the best of his recollection, Petitioner asserts that Mr. Nelson spent less than five hours of time with Petitioner discussing the case and preparing Petitioner's defense. In the spirit of full disclosure, Petitioner recalls that Mr. Nelson was experiencing severe health issues prior to the Petitioner's trial, which may have affected his ability to spend sufficient time on the Petitioner's case to adequately and competently represent

the Petitioner. Petitioner was facing extremely serious drug charges in which he was facing life in prison. Despite that fact, Mr. Nelson failed to spend sufficient time conferring with the Petitioner preparing the case, discussing trial strategies, and discussing potential evidence and witnesses for the defense. Petitioner ultimately received a life sentence with no possibility of release, and therefore was severely prejudiced by these omissions. Mr. Nelson's failures in this regard fell below objective standards of reasonableness, and constituted ineffective assistance of counsel.

2. Mr. Nelson failed to investigate potential witnesses for the defense, as requested by the Petitioner. Izatt had requested that Mr. Nelson contact and interview several potential witnesses for his defense, including Jan Izatt, Al Vasquez, Katie Howard, Amber Riding, and Diana McAtee. Izatt had expected witnesses Jan Izatt, Al Vasquez and Amber Riding to testify regarding numerous persons having access to the residence at issue, regarding the Petitioner being away from the residence and out of town for much of the time prior to the search of the residence, and regarding the Petitioner's work and sources of income. The Petitioner expected Katie Howard to testify to other persons having access to the residence at issue and to the Petitioner being out of town and away from the residence for much of the time just prior to the residence search. The Petitioner expected Diana McAtee to testify regarding the Petitioner's employment and income from vehicle repossession work.

This testimony would have significantly aided Izatt's defense because it would have provided alternative explanations to rebut the government's case and evidence. Evidence regarding legitimate work and sources of income would have helped rebut the government's theory that the Petitioner had no legitimate income yet had significant assets, and therefore must derive his monies from drug distribution. Evidence regarding the Petitioner's absence from the residence and frequent traveling out of town would have helped rebut the government's theory that the drugs could only be traced to the Petitioner, and would have bolstered the Petitioner's defense that someone other than the Petitioner was responsible for the drugs found in his residence. Evidence regarding numerous persons having unfettered access to the residence where the drugs were located would have rebutted the government's theory that the Petitioner was the only person who could have possessed the drugs at issue and bolstered the defense's theory that someone other than the Petitioner was responsible for the drugs. The Petitioner had expected witness Katie Howard to also testify concerning the circumstances surrounding the Petitioner's rocky relationship with the government's key witness Brandon Harvey, as she was Harvey's girlfriend who was specifically mentioned during trial testimony. This testimony could have helped rebut the government's position that Harvey was a reliable witness who was telling the truth regarding the Petitioner, and could have bolstered the defense's theory that Harvey was an

unreliable and untruthful witness who the jury should disregard.

Mr. Nelson's failure to contact, interview, and utilize these witnesses in the Petitioner's defense prejudiced Izatt by impairing his defense. The Petitioner asserts that Mr. Nelson's failures in this regard fell below objective standards of reasonableness and constituted ineffective assistance of counsel.

3. Mr. Nelson failed to spend sufficient time with the defense's witness Mariah Pace, to adequately prepare her for trial testimony. This failure resulted in the witness performing poorly at the jury trial and severely hampered Mr. Izatt's defense. See Section 12 (Gr. 2)(a)(3), *infra*. At the Petitioner's jury trial, the defense called three witnesses, including Mariah Pace. Mariah was a friend and ex-girlfriend of the Petitioner, and had intimate and specific knowledge regarding the case, the facts and the allegations at issue. She became the key witness for the defense when she admitted ownership of the drugs upon which the Petitioner was convicted. However, Ms. Pace testified poorly at the trial before the jury (Pace admitted to using methamphetamine before testifying on December 15, but that testimony was offered outside the presence of the jury, and therefore her usage did not affect her performance before the jury the next day, December 16th). Additional evidence in support of this allegation will be provided in the form on a supporting affidavit from Ms. Pace, which will be filed with the Court. Essentially, Mr. Nelson, who had ample opportunity to meet with Ms. Pace, especially given his prior

representation of and professional relationship with Ms. Pace, spent very little time with her. He did not prepare her to testify, did not review the questioning with Ms. Pace, and perhaps most importantly, did not take the time to prepare Ms. Pace for aggressive cross-examination, which Mr. Nelson certainly knew would be forthcoming from the government, given his significant trial experience. Had Mr. Nelson better prepared Ms. Pace to testify, she would have provided the Petitioner with a solid, credible witness whose testimony, offered competently and properly, would have had a significant impact on the jury and would have provided the Petitioner with an effective and believable defense. The Petitioner was clearly prejudiced thereby, in that Ms. Pace's uncounseled testimony was disregarded by the jury, who instead convicted Izatt.

4. Mr. Nelson failed to adequately and thoroughly investigate and interview the State's witness Brandon Harvey. This inadequacy resulted in Mr. Nelson failing to discover crucial evidence regarding Harvey's drug purchases from defense witness Mariah Pace at the Petitioner's home, which would have countered the government's theory and would have bolstered witness Mariah Pace's testimony regarding her ownership and possession of the drugs at issue. This failure further resulted in Mr. Nelson being unable to adequately cross examine and, in some instances, impeach the State's witness. This issue is discussed in greater detail below. See Section 12 (Gr. 2)(a)(6), *infra*.

5. Mr. Nelson requested a continuance, and thereby waived Petitioner's speedy trial rights, under the Speedy Trial Act, without consulting with the Petitioner. Petitioner has the right to a speedy trial under the Sixth Amendment to the United States Constitution and pursuant to the Speedy Trial Act, 18 U.S.C. §3161. However, constitutional speedy trial rights are typically waived, and statutory speedy trial time is deemed "excludable time", when the defense requests a continuance.

Petitioner asserts that Mr. Nelson essentially surrendered Petitioner's constitutional and statutory speedy trial rights by requesting a continuance of the proceedings, without first consulting with Petitioner and obtaining his consent. Petitioner asserts that he did not learn of the waiver and request for continuance until after it had occurred. Petitioner would not have surrendered his constitutional or statutory speedy trial rights absent a compelling reason, which he asserts did not exist. Petitioner was prejudiced because important rights were waived without his knowledge or consent. Petitioner asserts that Mr. Nelson's actions in this regard fell below objective standards of reasonableness and constitute ineffective assistance of counsel.

b. Direct Appeal: Petitioner filed a direct appeal from the judgment of conviction, but did not raise this issue in his direct appeal. The reason for not raising this issue in his direct appeal is that this issue is more appropriately addressed in post-conviction proceedings, pursuant to federal case law. *See United States v. Sitton*, 968 F.2d 947, 960 (9th Cir.

1992)(citations omitted).

- c. Post-Conviction Proceedings: Petitioner did not raise this issue in any prior post-conviction motion, petition or application.

Ground Two: Petitioner was denied his 5th, 6th and 14th Amendment rights to effective assistance of counsel during the jury trial phase of his criminal case.

- a. Supporting facts:

1. Petitioner's trial court attorney, Mr. Nelson failed to present crucial evidence to the jury which would have contradicted the Government's theory of the case and which would have bolstered the Petitioner's defense. These trial mistakes, individually and cumulatively, fell below objective standards of reasonableness, and constituted ineffective assistance of counsel.

a. First, Mr. Nelson failed to present evidence that numerous other persons besides the Petitioner had unfettered access to the Petitioner's house and, therefore, could have been the source of the drugs. The Petitioner discussed with Mr. Nelson the fact that he, witness Holly Sutherland and several other persons could testify that a large number of people had easy or unfettered access to the Petitioner's home during the time frame when the pertinent events in this case occurred. However, Mr. Nelson failed to introduce this important evidence, which undoubtedly left the jury with the mistaken impression that only Izatt himself could have been the source of the drugs. See Section 12 (Gr. 1)(a)(2),

supra.

- b. Second, Mr. Nelson failed to present evidence and testimony from persons with information regarding other sources of income for the Petitioner. Since "intent to distribute" was an element of the offense charged against Izatt, the government had to prove that Izatt intended to distribute drugs, not just possess them for personal use. At trial, the government spent considerable time and effort attempting to prove that the Petitioner had no "legitimate" sources of income and, therefore, he must have been dealing any drugs he had in his possession. The Petitioner discussed with Mr. Nelson the fact that several witnesses could be called to testify regarding the Petitioner's legitimate income from his welding business as well as vehicle repossession work he performed. This evidence would have directly contradicted the government's theory and would have provided the Petitioner with an opportunity to challenge the "intent to distribute" element of the charged crime. Mr. Nelson's failure to produce evidence and testimony on this crucial issue fell below objective standards of reasonableness, and constituted ineffective assistance of counsel.
- c. Third, Mr. Nelson failed to present evidence in the form of photographs of the Petitioner's home, which had been provided to him in discovery and by other persons at the request of the Petitioner. These photographs included pictures of the

Petitioner's garage full of welding equipment, which supported his claim of legitimate employment and explained his ability to have income to acquire the assets at issue without resorting to drug dealing. The photographs also demonstrated that there were women's clothes in the residence, which supported the defense's position that other persons occupied and utilized the residence, and would help rebut the government's theory that the Petitioner was the sole person who could have been responsible for anything found in the residence.

d. Fourth, Mr. Nelson failed to present evidence and testimony that the Petitioner was out of town, and actually across the state, in the days and weeks prior to the search of the residence in which the drugs were located. The Petitioner, and others, discussed with Mr. Nelson that in addition to the fact that numerous other persons had access to his residence (*see* Gr. 2 (a)(1)(b), above), he was out of town and across the state, mainly in the Boise area, in the days and weeks before the day of the residence search which produced the drugs at issue. This evidence would have strongly bolstered the Petitioner's defense and would have corroborated witness Mariah's Pace testimony that she was the sole source of the drugs in Izatt's residence.

2. Mr. Nelson made a false, unfulfilled promise to the jury to produce a witness at trial, which he failed to do. At trial, during his opening

statement to the jury, Mr. Nelson promised the jury that they would hear directly from the Petitioner. Mr. Nelson stated “Justin Izatt is going to testify and he is going to tell you [facts about the case]”. This was an unequivocal promise (and not merely an expression of hope) that a particular witness (and not just any witness, but the most important possible witness, the defendant himself) would talk to the jury and deny the allegations against him. Mr. Nelson broke that promise to the jury.

The Ninth Circuit Court of Appeals has held that such a broken promise to the jury constitutes ineffective assistance of counsel. *Saesee v. McDonald*, No. 10-15895 (9th Cir. 2013). In *Saesee*, the Ninth Circuit held that “[w]hile a defendant’s denials are not the strongest evidence, the failure to make those denials, when the jury was promised that he would, left the strong inference that everything [the defendant] failed to deny must, in fact, be true.” *Id.* at p. 8. The Ninth Circuit further noted that

“A juror’s impression is fragile. It is shaped by his confidence in counsel’s integrity. When counsel promises a witness will testify, the juror expects to hear the testimony. If the promised witness never takes the stand, the juror is left to wonder why. The juror will naturally speculate why the witness backed out, and whether the absence of that witness leaves a gaping hole in the defense theory. Having waited vigilantly for the promised testimony, counting on it to verify the defense theory, the juror may resolve his confusion through negative inferences. In addition to doubting the defense theory, the juror may also doubt the credibility of counsel.” *Id.* at pp. 9-10.

Mr. Nelson's failure to follow through with his promise to the jury prejudiced the Petitioner and constituted ineffective assistance of counsel.

3. Mr. Nelson failed to adequately present defense witnesses' testimony at trial, based in significant part on his failure to prepare witnesses for their trial testimony. *See Section 12 (Gr. 1)(a)(3), supra.* Specifically, regarding defense witness Mariah Pace, after she admitted to actual ownership of the drugs at issue, a monumentally significant admission during the trial, Mr. Nelson made no effort to develop the testimony, to have the witness provide additional details, or to request clarification of the testimony, so as to bolster the believability and credibility of the testimony. As a result, the key, crucial testimony consisted of a mere one-line assertion without any support or explanation. This significantly weakened the impact of the testimony, which, if believed, would have completely changed the complexion of the case.
4. Mr. Nelson committed significant errors concerning defense witness Mariah Pace. During the jury trial, the witness was called to the stand on the afternoon of the second day of trial. Based on the District Judge's direction, the witness was subjected to examination outside the presence of the jury. After a break, the Court reconvened, and recessed for the remainder of the afternoon. That evening, the witness was interviewed by the government, who subsequently offered her immunity for her testimony. The government did not provide a

supplemental discovery response regarding this witness for the interview or the offer of immunity.

- a. When counsel learned that the witness was being interviewed by the government, and unexpectedly being offered immunity for her testimony, counsel failed to request a continuance on the record to investigate the facts behind this series of events.
- b. When this occurred, counsel failed to conduct any additional interviewing or investigation of the witness.
- c. When this occurred, counsel failed to request a continuance to locate and interview the witness' source of drug supply, Chris Ayers, to dispute or counter the government's evidence and theory that Ayers could not possibly have been the witness' source of the drugs at issue.

5. Mr. Nelson failed to impeach the government's key witness Brandon Harvey regarding his demand for immunity, and failed to argue this key factor to the jury in the defense's closing statement. At the jury trial of this matter, Brandon Harvey became a key witness for the government against the Petitioner. At trial, Harvey demanded immunity from the government, which was subsequently granted. While the exact reasoning for doing so is not on the record, it is reasonable to infer that Harvey demanded immunity so as to avoid prosecution for anything he might say, which is the underlying purpose for immunity. An effective defense attorney can exploit this issue to the defense's advantage by

suggesting that the witness is demanding immunity because he is engaging in wrongdoing, such as not telling the truth or committing perjury. Mr. Nelson failed to question or impeach witness Harvey on this crucial fact, and failed to discuss Harvey's demand for immunity during closing argument to the jury. In failing to do so, Mr. Nelson missed a crucial opportunity to call into question the truthfulness and veracity of the government's key witness. While trial counsel's general strategic trial decisions are not second-guessed on review (*see Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 Led.2d 674 (1984)), this glaring omission fell below objective standards of reasonableness and constituted ineffective assistance of counsel.

6. Mr. Nelson failed to exercise due diligence in developing the testimony of defense witnesses Brandon Harvey and Mariah Pace; specifically, that Harvey was purchasing methamphetamine directly from Pace at the residence in question, and therefore, the drugs found in the residence could very well have belonged to Pace rather than Izatt, as Pace testified. (*See "Order" (denying Motion For New Trial) of District Court, May 28, 2013 (CR 10-112 Dkt. No. 103, p. 6)*). Had he effectively and competently examined witness Brandon Harvey, Mr. Nelson could have brought out significant additional testimony that would have corroborated the testimony of Mariah Pace and bolstered the defense in general. *See, e.g., Affidavit of Brandon Harvey, Ex. G to Memorandum in Support of Motion For New Trial, (CR-10-112 Dkt.*

No. 98-8). In fact, witness Harvey himself admitted that he had substantial additional information to add to the overall picture, or to clarify or supplement the evidence already known, but that was never brought out by Mr. Nelson. *Id.* Even the District Court noted that “these clarifications could have been made by Izatt’s counsel when cross examining or directly examining Mr. Harvey as a witness”, and “the statements in the affidavit of Mr. Harvey could have been discovered by counsel via the exercise of due diligence and examination of Mr. Harvey at trial.” Order (denying Motion For New Trial) of District Court, May 28, 2013 (CR 10-112 Dkt. No. 103, p. 6). The District Court further noted that “[c]ounsel did not exercise due diligence on these [Harvey] clarifications . . . ” *Id.* at p. 7. Petitioner agrees with the District Court that Mr. Nelson did in fact fail to exercise due diligence in his examination of this key government witness, resulting in significant prejudice to the Petitioner. Mr. Nelson’s failures in this regard fell below objective standards of reasonableness, went well beyond basic trial strategy decisions, and constituted ineffective assistance of counsel.

7. Mr. Nelson had a conflict of interest during his trial representation of the Petitioner. Mr. Nelson represented the Petitioner while also representing a government witness, who later became a defense witness, Mariah Pace.

As discussed by the United States Supreme Court, criminal defense attorneys have a duty of loyalty and to avoid conflicts of interest. *Strickland, supra*, 466 U.S. at 688 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 346, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)). By failing to avoid a potential conflict of interest while representing the Petitioner along with a potential government witness and actual trial witness, Mr. Nelson breached the duty of loyalty and provided ineffective assistance of counsel.

- b. Direct Appeal: Petitioner filed a direct appeal from the judgment of conviction, but did not raise this issue in his direct appeal. The reason for not raising this issue in his direct appeal is that this issue is more appropriately addressed in post-conviction proceedings, pursuant to federal case law. *See Sitton, supra*.
- c. Post-Conviction Proceedings: Petitioner did not raise this issue in any prior post-conviction motion, petition or application.

Ground Three: Petitioner was denied his 5th, 6th and 14th Amendment rights to effective assistance of counsel during the sentencing phase of his criminal case.

- a. Supporting facts:
 1. Petitioner's trial court attorney, Mr. Nelson failed to file any objections to the PreSentence Investigation Report ("PSR"). *See Addendum to PreSentence Investigation Report*, p. 1 (3). Had Mr. Nelson taken the proper time to review the PSR with the Petitioner prior to the objection deadline and made an effort to defend the Petitioner at the sentencing

phase, the defense could have objected to several important items in the PSR, including the incorrect computation of the Petitioner's criminal history points by counting offenses as separate offenses even though they were sentenced together, the offense enhancements, and the criminal history points enhancement for being on probation when his probation was tolled under Idaho law.

2. Mr. Nelson failed to review the PreSentence Investigation Report with Petitioner prior to the objection deadline. Mr. Nelson did not review the PSR with the Petitioner until a few days prior to Petitioner's Sentencing Hearing. As a result, the Petitioner had no opportunity to rebut any of the information in the PSR, to provide witnesses and evidence to Mr. Nelson to submit in response to the PSR, and no opportunity to prepare any presentation for the Court in response to the PSR.
3. Mr. Nelson failed to request a continuance of the Sentencing Hearing, despite erroneously not receiving the initial draft of the PSR in a timely fashion. Through no fault of his own, Mr. Nelson did not receive the initial draft of the PSR when it was issued. However, upon learning of this fact at a later date, Mr. Nelson took no steps to remedy the problem, such as requesting a continuance of the proceedings to properly review the PSR, prepare objections to the report, and allow ample time for him to meet with the Petitioner, review the PSR, and prepare a strong rebuttal and response to the PSR.
4. Mr. Nelson failed to provide any objections or briefing to the District Court

regarding an Eighth Amendment challenge to the life sentence proposed in the PreSentence Investigation Report. Mr. Nelson filed no objections to the PSR, as discussed above, filed no Sentencing Memorandum, and filed no briefing or legal memoranda in the case, despite the fact that the PSR recommended life in prison without the possibility of release. Mr. Nelson failed to offer any sentencing defense or argue any mitigating factors, such as the Petitioner's severe mental health issues (see PSR, ps. 18-19, paras. 73-80), physical, sexual and psychological abuse during his childhood (see PSR, ps. 17-18, paras. 67-71, p. 20, para. 87), parental abandonment (see PSR, p. 17, paras. 67, 69), and severe drug addiction (see PSR, 19-20, paras. 81-85). Mr. Nelson made no effort to defend his client, the Petitioner, from the harshest non-capital sentence available under American law. Attorneys have a duty to zealously represent their clients and their interests, as discussed herein above at pages 3-4. Mr. Nelson failed to make reasonable efforts to zealously represent the Petitioner against a fixed life sentence, and his deficiencies fell below objective standards of reasonableness.

- b. Direct Appeal: Petitioner filed a direct appeal from the judgment of conviction, but did not raise this issue in his direct appeal. The reason for not raising this issue in his direct appeal is that this issue is more appropriately addressed in post-conviction proceedings pursuant to federal case law. *See Sitton, supra.*
- c. Post-Conviction Proceedings: Petitioner did not raise this issue in any

prior post-conviction motion, petition or application.

13. Petitioner has not previously raised these grounds in any federal court, because these grounds and claims were most appropriately presented through a Petition To Vacate Sentence pursuant to 28 U.S.C. §2255 and interpreting case law. *See Sitton, supra.*

14. Petitioner has no motions or other petitions now pending in the District Court for the Judgment currently being challenged. Petitioner has an appeal case now pending before the Ninth Circuit Court of Appeals for the Judgment currently being challenged. The appeal is Ninth Circuit case no. 13-30155, in which Petitioner has appealed the denial of his Motion For New Trial. A recent, separate appeal (Ninth Circuit case no. 13-30198), in which Petitioner appealed his Judgment, conviction and sentence pursuant to new constitutional standards set forth by the United States Supreme Court in *Alleyne v. United States*, 133 S.Ct. 2151 (2013), was denied on September 9, 2013.

15. Attorneys: Petitioner was represented by the following attorneys in this and related matters:

- a. At Preliminary Hearing: None held
- b. Arraignment and Plea: D. Doug Nelson, The Roark Law Firm, 409 N. Main Street, Hailey, ID 83333
- c. Jury Trial: D. Doug Nelson
- d. Sentencing: D. Doug Nelson
- e. On appeal: Paul E. Riggins, Riggins Law, P.A., P.O. Box 5308, Boise, ID 83705 (CJA counsel)

f. Motion For New Trial: Paul E. Riggins (privately retained)

16. Petitioner was not sentenced on more than one count of an Indictment, nor on more than one Indictment.

17. Petitioner does not have any future sentence to serve after he completes the sentence for the Judgment being challenged.

18. Petitioner asserts that his Petition is timely because it was filed within one year after the denial of his Petition for Writ of Certiorari was issued in this case, and/or within one year of any currently pending matter before the Court in this case.

Petitioner also bases his Motion on the affidavits in support, which he will file in this matter.

Based upon the above and foregoing, Petitioner asks that the Court grant the following relief: That the Petitioner's Judgment be set aside, and the matter remanded to the District Court for further proceedings consistent therewith; or any other relief to which he may be entitled.

DATED this 30th day of September, 2013.

/s/ Paul E. Riggins
PAUL E. RIGGINS
Attorney for Petitioner Izatt

VERIFICATION OF PETITION

I, Justin L. Izatt, being duly sworn under oath, state and declare, under penalty of perjury:

I know of the contents of the foregoing document, and that the matters and allegations set forth are true and correct to the best of my knowledge and belief.

JUSTIN L. IZATT

SUBSCRIBED AND SWORN to before me this _____ day of _____, 2013.

Notary Public for California
Residing at _____, CA
My commission expires: _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of September, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to the following persons:

Christian Nafzger
Assistant United States Attorney
District of Idaho
800 E. Park Boulevard, Ste. 600
Boise ID 83712-9903

/s/
Paul E. Riggins

Appendix 5

Affidavit of Douglas Nelson

District Court
July 10, 2015

DOUGLAS NELSON, ISBN 4410
THE ROARK LAW FIRM, LLP
409 North Main Street
Hailey, Idaho 83333
TEL: 208/788-2427
FAX: 208/788-3918

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

JUSTIN LYLE IZATT,)	Case No. CR-10-0112-S-EJL CV-13-0431-S-EJL
Petitioner,)	
vs.)	AFFIDAVIT OF DOUGLAS NELSON
UNITED STATES OF AMERICA,)	
Respondent.)	
<hr/>		
STATE OF IDAHO)	
County of Blaine)	ss.

DOUGLAS NELSON, being sworn upon oath, deposes and states as follows:

1. I am an attorney duly licensed to practice law in the State of Idaho;
2. I make the averments contained herein of my own personal knowledge and would testify to the facts as presented herein if called upon to do so;
3. Count 1 (Counsel failed to spend sufficient time preparing for trial).

Mr. Izatt's case, although very serious, was not in any way a complicated case.

Your affiant did spend as much time preparing for trial as he thought he needed. There were no money issues or geographic problems that caused trial counsel to spend inadequate time preparing for trial. In fact, once Mr. Izatt was transferred to the Boise area, he hired a Boise attorney (Scott Gatewood) so that Mr. Izatt and Mr. Gatewood could meet as needed, because

AFFIDAVIT OF DOUGLAS NELSON - 1

your affiant's primary place of business is in Hailey, Idaho. Your affiant was able to get as much information about the case and the defense as he needed during the multiple visits with Mr. Izatt when he was out of custody while the case was a State case, and then when he was in custody when the case went Federal.

While your affiant did suffer a semi-serious health issue right before the trial was to begin, the trial was re-set and your affiant was fine within weeks of the problem. Health issues played no part in the preparation for trial.

4. Count 2 (Failure to produce witnesses at trial).

It was your affiant's opinion that Mr. Izatt's defense would either stand or fall on the credibility of the Government's confidential informant, Mr. Harvey. Your affiant actually was able to personally interview Mr. Harvey on two occasions before trial. Your affiant has handled hundreds of drug cases in his 24 year legal career this was the first case where he has actually been able to personally interview a CI, because the CI's handler always prevents that from happening. Based upon these interviews, your affiant suspected that Mr. Harvey may not testify without federal immunity. Your affiant believed that if that happened, which it did, the jury might be unwilling to believe his testimony.

Your affiant did interview several witnesses that Mr. Izatt told him about. Your affiant does not now recall the specific reasons for not calling them as witnesses, but whatever these people could testify about did not fit with the trial strategy, and in at least a couple of examples, would have been detrimental to the defense.

5. Count 3 (Mariah Pace as a witness).

Your affiant did in fact spend considerable time discussing the case with Mariah Pace, but she was still a disaster as a witness. Mr. Izatt was quite adamant that he use her as a

witness in his case, even though your affiant thought it was a bad idea, and communicated that to Mr. Izatt. Your affiant probably spent in excess of ten hours discussing Mr. Izatt's case over the course of six months and multiple face to face interviews, but is your affiant's opinion that if he had spent 100 or 200 hours with her, she would still have been a disaster as a witness. This was primarily due to her admitted drug use. In fact, your affiant remembers Ms. Pace admitting in court to using Methamphetamine just the day before her appearance in Court.

6. Count 4 (Brandon Harvey as a witness).

As discussed above, your affiant did in fact meet with the Government's confidential informant to discuss the case and what Mr. Harvey knew about Mr. Izatt and the police officers involved. Your affiant asked all the questions he felt were relevant and based his trial strategy on the answers Mr. Harvey gave. It appears from a reading of Mr. Izatt's motion to vacate his sentence that Mr. Harvey is now much more willing to relate details of the case than he was at the time of trial and during the interviews with your affiant, which is understandable, because your affiant believes that Mr. Harvey's state court case was just put on hold while Mr. Izatt's case went to trial. The idea there is that what happened to Mr. Harvey in state court would be dependent on the level of cooperation given to the Government in Mr. Izatt's Federal case, but now that Mr. Harvey can suffer no further consequences is happy to talk more freely. Your affiant exhausted all avenues of possible defense with Mr. Harvey and used what he was told by Mr. Harvey at trial.

7. Count 5 (Continuance)

It is true that your affiant did request and receive a continuance of trial without first discussing the matter with Mr. Izatt. Trial in this case was to begin on a Monday. On the Friday before trial was to begin, your affiant began bleeding from his nose in a manner totally

inconsistent with a normal nose bleed. He was rushed to the hospital and was admitted into the emergency room. There, after several hours of trying to stop the bleeding, a temporary inflatable nasal stent was placed high in your affiant's nasal passageway. During these medical procedures, your affiant was concerned about his ability to be available for trial in just three days. Your affiant asked the attending physician who said your affiant would not be doing anything in the near future, because he had not yet even diagnosed the problem, but he thought your affiant has suffered an extra-cranial aneurism which would probably need to be corrected with surgery. Your affiant called his staff who filed the motion to continue along with a letter from the attending physician. This needed to be done immediately because it was Friday and your affiant did not want a jury to be called in only to be dismissed once your affiant was not present in Court the next Monday. There was no time to consult with Mr. Izatt before requesting the continuance, but even if he had been consulted, your affiant could not have participated in a trial based on a medical emergency.

8. Count 6 (Testimony about others having easy access to Mr. Izatt's home)

Your affiant does not remember the facts the same way that Mr. Izatt's petition relays them to the court. Your affiant was told that Mariah Pace and Holly Sutherland were the only ones who had access to the house. Mr. Izatt did not want to allege that either of these friends of his were responsible for the drugs in his house. The best your affiant could do with this issue is to point out that Brandon Harvey had possession of the garage door opener so he could have gotten into the house.

9. Count 7 (Source of income evidence)

Your affiant explored this issue and decided that calling the particular owner of the company Mr. Izatt said he worked for to the stand at trial would be a big mistake. First of all,

your affiant understood the man to be the owner of a bail bond and/or pawn shop business that also did motor vehicle repossession. Your affiant did not like the "look" of that. Secondly, your affiant believed the man to be experiencing his own criminal prosecution for taking documents out of court files, or something like that. He may very well have convinced the jury that Mr. Izatt was not really gainfully employed. It was your affiant's trial strategy to leave this evidence out of the trial.

10. Count 8 (Photographs)

Your affiant did not introduce photographs of Mr. Izatt's home at trial. Your affiant believed that these pictures would do more harm than good, because the various photos showed that Mr. Izatt owned several "classic" cars, a boat, and other personal property that is would be unlikely for a person who sometimes did welding jobs or sometimes did motor vehicle repossession to afford.

11. Count 9 (Evidence that Mr. Izatt was in Boise preceding the drugs being found in his residence)

Your affiant knew that Mr. Izatt contended that he had been out of the Twin Falls area for some time before his arrest. He had also been back in the Twin Falls area for a while directly before the drugs were found in his house. For the reasons stated in paragraph nine above, this evidence seemed irrelevant to your affiant.

12. Count 10 (Opening Statement)

Trial is always a thing in motion. Your affiant cannot count the number of jury trials he has had where things were said during opening statement that have to be revised after all the evidence is in. Mr. Izatt and your affiant jointly concluded at the end of the case that it would be best if he did not take the stand, given the fact that Mariah Pace told the jury that the drugs

were hers, a fact your affiant did not know about until she testified. The trial strategy all along was to have Mr. Izatt testify that the drugs were planted by Mr. Harvey and let the Jury see who they believed, given Mr. Harvey was getting a very special deal in his state case in exchange for his testimony. Once Mariah Pace testified that the drugs were hers, Mr. Izatt could not very well take the stand and say she was lying because they were planted by Mr. Harvey.

13. Count 11 (Mariah Pace Testimony)

Mariah Pace would not testify without federal immunity. Your affiant had no idea she was going to take responsibility for the drugs. Your affiant was caught completely flatfooted and had no way to verify her assertions. If your affiant would have known what she was going to say before trial, he could have been prepared with corroborating evidence to bolster her credibility. In fact, Mr. Gatewood, not your affiant, handled Mariah Pace as a witness.

14. Count 12 (Mariah Pace being debriefed by Government and given immunity)

Mr. Izatt asserts in his pleadings that your affiant should have asked for a continuance once it was learned that the government had given Mariah Pace immunity. Mr. Izatt is right. Your affiant was stunned when, for the first time on the last day of trial, he was told that Ms. Pace was in fact granted immunity the night before, but that the Government would not use her as a witness. Your affiant had no idea of the level of debriefing that occurred during the night, and because the Court had appointed her an attorney, your affiant was unable to talk to her directly about any of this. Your affiant did try to get details about what had gone on during the night from the Assistant United States Attorney handling the case but all he said was "wait and see once court starts." But it wasn't until the Government began its cross-examination of Ms. Pace that it became obvious what the extent of the problem was. The government was able to

learn from Ms. Pace what she was going to say on the stand and then investigate her story during the night. The government did not produce any witness statement to your affiant, nor did they produce anything that was later used in the cross-examination of Ms. Pace. Your affiant should have demanded both a supplemental discovery response and a continuance of the trial so that he could independently try to verify Ms. Pace's testimony. Your affiant did not do either of these things which did deprive Mr. Izatt of a fair trial. It is unknown what Judge Lodge would have done with this mess, but your affiant should have at least tried to get time to deal with Ms. Pace's testimony.

15. Count 13 (Brandon Harvey evidence in closing)

The jury knew very well what kind of sweet deal Mr. Harvey was getting in exchange for making the Izatt case. They did not need your affiant to point that out again in closing.

16. Count 14 (The Harvey and Pace connection)

Your affiant never knew of any connection between Brandon Harvey and Mariah Pace until reading Mr. Izatt's Petition. Because your affiant was not told of this connection, he could not very well develop it.

17. Count 15 (Conflict of Interest)

If your affiant would have known that Mariah Pace was going to tell a federal jury that the drugs were hers and not Mr. Izatt's, I would have withdrawn and let co-counsel, Mr. Gatewood, handle the trial. As it was, however, there did not appear to be a problem with Mariah being a witness in a case when your affiant had previously represented her in another case. Additionally, Mr. Gatewood handled all of Ms. Pace's testimony at trial.

18. Count 16 (PSR and Argument at Sentencing)

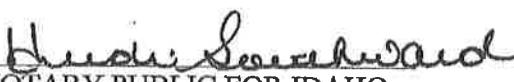
Your affiant and Mr. Izatt did go over the PSR together and Mr. Izatt did not call attention to any errors contained therein. Additionally, your affiant did study the PSR and did not see any problems with how the calculations were conducted. Because this was a mandatory fixed life case, there did not seem to be any point to an argument at sentencing. Mainly, your affiant wanted to make a statement about the complete unfairness of that kind of a sentence for the possession of less than 50 grams of Methamphetamine.

FURTHER YOUR AFFIANT SAYETH NOT.

DATED this 5 day of May, 2015.


Douglas Nelson

SUBSCRIBED AND SWORN to before me this 5 day of May, 2015.


Heidi Southward
NOTARY PUBLIC FOR IDAHO
Residing at Harley
Commission expires 1-16-17

